Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches

(WT/DS238)

Executive Summary of the United States

July 18, 2002

I. A Contracting Party Should Generally Examine Relevant Data from its Entire Standard Review Period to Provide Objectivity in its Analyses of Import Volume

1. The Safeguards Agreement does not establish any particular methodology or analytic framework for evaluating increased imports. Article 2.1 merely states that a competent authority must determine "pursuant to" the other provisions of the Safeguards Agreement that imports are taking place "in such increased quantities, absolute or relative to domestic production . . . as to cause or threaten to cause serious injury to the domestic industry." Article 4.2(a), in turn, simply states that competent authorities shall evaluate all relevant factors of an "objective and quantifiable nature" having a bearing on the situation of the industry, including "the rate and amount of increase in imports of the product concerned in absolute and relative terms."

2. In *United States – Lamb Meat*, however, the Appellate Body stated that a competent authority "should not consider [the most recent] data in isolation from the data pertaining to the entire period of investigation." The Appellate Body further stated that "in conducting their evaluation under Article 4.2(a), competent authorities cannot rely exclusively on data from the most recent past, but must assess that data in the context of the data for the entire investigative period."[1] These statements support the conclusion that a competent authority should generally examine *all* of the data that it has collected for the *entire* investigative period, provided that the data is reliable and useable and that there are no circumstances indicating that examination of a different time period would be appropriate.

II. The Panel Should Decline to Consider Extra-Record Evidence That Was Not Before the Competent Authority

3. In challenging Argentina's analysis of increased imports, Chile cites tables containing data on apparent consumption of preserved peaches for the years 1994 to 1996 drawn from a study that CNCE prepared in 1998. If the study was not part of the record in the challenged investigation, the Panel should disregard it.

4. It is a fundamental aspect of the standard of review of competent authorities' determinations in safeguard investigations that the review of those determinations be based on the record that was before the competent authorities, and not on extra-record evidence. In *United States – Wheat Gluten,* the panel concluded that "it is for the USITC to determine how to collect and evaluate data and how to assess and weigh the relevant factors in making determinations of serious injury and causation." That panel stressed that "[i]t is not our role to collect new data, or to consider evidence which could have been presented to the USITC by interested parties in the investigation, but was not."[2]

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[1] Report of the Appellate Body on *United States - Safeguard Measures on Imports of Fresh, Chilled and Frozen Lamb Meat from New Zealand and Australia,* WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para. 138 ("*United States – Lamb Meat (AB)*").

[2] Report of the Panel on *United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities,* WT/DS166/R, adopted 19 January 2001, para. 8.6.

5. The *United States – Hot Rolled Steel* panel reached a similar conclusion based on its analysis of DSU Article 11.[3] If a panel considers new information that was not before the competent authority, the panel would be weighing these new facts against the evidence already on the record. In *United States – Lamb Meat*, the Appellate Body found that panels are not entitled to conduct such *de novo* reviews.[4]

III. The Safeguards Agreement Does Not Mandate a Three-Stage Approach to Non-Attribution

6. Chile argues that "[f]or an analysis of causal link to be consistent with Articles 2 and 4.2(b) of the [Agreement], the methodology adopted by the investigating authorities must consist of a three-stage approach that complies with the so-called principle of non-attribution of injurious effects of other factors." The Safeguards Agreement does not require such a three-stage approach.

7. In *United States – Lamb Meat*, the Appellate Body referenced the same passage from *United States – Wheat Gluten* that Chile cites and clarified that the "three-stage approach" is not required. The Appellate Body stated that the three steps describe "a logical process for complying with the obligations relating to causation" in Article 4.2(b). It stated that the steps are not legal "tests" mandated by Safeguards Agreement, and that it was not imperative that each step "be the subject of a separate finding or a reasoned conclusion by the competent authorities."

IV. The Safeguards Agreement Does Not Require Competent Authorities to Demonstrate that Imports Alone Caused a Degree of Injury that is "Serious"

8. Chile argues that Argentina failed to demonstrate that the threat of injury from increased imports alone reached the threshold of "serious" injury. Article 4.2(b) does not require a competent authority to demonstrate that imports, standing alone, caused serious injury.

9. In *Wheat Gluten*, the Appellate Body made clear that increased imports need not be the sole cause of the injury.[5] Similarly, in *United States – Lamb Meat*, the Appellate Body stated that the Safeguards Agreement "does not require that increased imports be 'sufficient' to cause, or threaten to cause, serious injury. Nor does the Agreement require that increased imports 'alone' be capable of causing, or threatening to cause, serious injury."[6] Finally, in *United States – Line Pipe,* the Appellate

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[3] Report of the Panel on *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan,* WT/DS184/R, adopted 23 August 2001, para. 7.7.

[4] *United States – Lamb Meat (AB)*, para. 106.

[5] *See* Report of the Appellate Body on *United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities,* WT/DS166/AB/R, adopted 19 January 2001, para. 67.

[6] *United States – Lamb Meat (AB),* para. 170.

Body explained that "to meet the causation requirement in Article 4.2(b), it is not necessary to show the increased imports alone – on their own – must be capable of causing serious injury."[7]

V. Current Facts May Support Threat of Serious Injury Determinations

10. Chile argues that CNCE impermissibly based its finding of threat of serious injury on the fact that there were no indications that current international market conditions would change in the imminent future. Chile argues that CNCE's threat analysis was based on conjecture or remote possibility and not on facts.

11. The Appellate Body has analyzed threat of serious injury as encompassing a lower threshold than serious injury and has found that there is often "a continuous progression of injurious effects eventually rising and culminating in what can be determined to be 'serious injury,'" since "[s]erious injury does not generally occur suddenly."[8] The Appellate Body has concluded that in drafting the Safeguards Agreement, Members defined threat of serious injury separately from serious injury so that an importing Member could act sooner to take preventive action when increased imports posed a threat of serious injury.[9]

12. Nothing in the Safeguards Agreement prohibits a competent authority from basing a threat of serious injury determination on current facts which, if continued, will result in serious injury, coupled with a finding that nothing in the record indicates that such facts will change in the imminent future.

VI. There Is No Basis for "Presuming" a Breach of Article 5.1

13. Chile states that a Member that establishes an inconsistency with Article 4.2(b) of the Safeguards Agreement also establishes a presumption of inconsistency with Article 5.1 of the Safeguards Agreement. There is no reference to such a presumption in Article 4.2(b) or Article 5.1, and there is no basis for reading one into the text. The Appellate Body has made it clear on numerous occasions that the rights and obligations of WTO Members are to be found in the actual text of the WTO Agreement, and not in layers of interpretation that are read into that text.[10] The Appellate

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[7] Report of the Appellate Body on *United States - Definitive Safeguard Measures on imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, para. 209 ("*United States – Line Pipe (AB)*").

[8] *United States – Line Pipe (AB)*, paras. 168 and 169.

[9] *United States – Line Pipe (AB)*, para. 169.

[10] Appellate Body Report on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 2 September 1998, para. 45 (stating that principles of interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.").

Body's guidance is particularly apt in this case, because other provisions of the WTO Agreements do contain provisions that establish presumptions.

14. For example, Article 3.8 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") states that "[i]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment." Similarly, Article 2.4 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* states that "[s]anitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures . . . ." And Article 2.5 of the *Agreement on Technical Barriers to Trade* states that "[w]henever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2 . . . it shall be rebuttably presumed not to create an unnecessary obstacle to international trade."[11]

15. These excerpts demonstrate that when the WTO drafters intended to create presumptions in the agreements, they did so explicitly. There is no reference to a presumption in Article 4.2(b) or Article 5.1, and such presumptions may not be imputed into the Safeguards Agreement.

VII. Chile's Challenge to the Extent of Application of the Measure

16. Chile's challenge to the extent of application of the safeguard measure is limited to just two paragraphs. Chile asserts that the measure imposed an extra 70 percent on the customs duties applicable to Chilean imports. It then asserts that the duty amounted to an import prohibition.

17. The United States questions whether Chile's arguments are sufficient to meet its initial burden of making a *prima facie* case. For example, merely noting that imports stopped after the safeguard measure was imposed does not necessarily prove that the safeguard measure was responsible. Chile's arguments fail to address the central issue, which is whether a prohibitive tariff (assuming the tariff was prohibitive) went beyond what was necessary under the facts of this particular case. Depending on the facts underlying a particular safeguard action, it is possible that such an approach would be appropriate. Chile has not addressed this issue.

VIII. Unforeseen Developments

18. Article XIX of the GATT 1994 does not require a competent authority to demonstrate a "cause-effect" relationship between unforeseen developments and increased imports. As the panel found in *United States – Lamb Meat*, there is no textual basis in Article XIX for a "two-step causation

[11] *See also* Article 3.2 of the SPS Agreement and Article 16.1 of the TRIPS Agreement.

approach" that would require a Member to demonstrate that unforeseen developments caused an increase in imports that in turn caused serious injury or threat.[12]

19. Rather, as the *Lamb Meat* panel stated, the term "unforeseen developments" in Article XIX is grammatically linked to both the terms, "in such increased quantities" and "under such conditions."[13] Therefore, unforeseen developments can result in increased imports, or in a change in the "conditions" that apply to such imports, or both. Indeed, as the phrasing of Article XIX suggests, there may be an interplay between the conditions under which increased imports affect a domestic industry and the quantity of the increase that will cause serious injury. For example, an increase in imports that might not ordinarily cause serious injury could cause such injury if the conditions of competition unexpectedly changed.

20. Thus, Article XIX does not require a competent authority to demonstrate that unforeseen developments "caused" an increase in imports. Rather, it may be enough for the authority simply to demonstrate that unforeseen developments have resulted in increased imports entering "under such conditions" so as to cause serious injury or threat.

IX. Increased Imports and Serious Injury or Threat

21. Chile stated in its first written submission that there can be no threat of serious injury if there is no increase in imports. Under Article 2.1 of the Safeguards Agreement, a Member may apply a safeguard measure only if increased imports are causing or threatening to cause serious injury to a domestic industry. Thus, there must be a causal link between increased imports on the one hand, and serious injury or threat on the other, before a Member would be justified in applying a safeguard measure. Both conditions must be present.

22. This does not mean, however, that there must be increased imports for there to be serious injury or threat. As a factual matter, it is possible for an industry to encounter serious injury or a threat of serious injury even in the absence of increased imports. The latter is not a necessary component of the former. A Member would not, however, be justified in applying a safeguard measure in such a case.

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[12] Report of the Panel on *United States - Safeguard Measures on Imports of Fresh, Chilled and Frozen Lamb Meat from New Zealand and Australia,* WT/DS177/R, WT/DS178/R, adopted 16 May 2001, para. 7.16 ("*United States – Lamb Meat (Panel)*").

[13] *United States – Lamb Meat (Panel)*, para. 7.16.